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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
INCOME TAX APPEAL NO. 773 OF 2004

The Commissioner of Income Tax ... Appellant
Versus
M/s. R.K. Industries ... Respondents

Mr.A.D. Kango with Mr. P.S. Sahadevan for Appellant.

Mr.A.K. Jasani, i/by L.C. Tolat & Co. for Respondents.

CORAM: F.I. REBELLO &
J.P. DEVADHAR, JJ.
DATED: OCTOBER 03, 2007

P.C.:

. One M/s. Chimanlal Devchand & Co. were owners of the immovable property which was transferred to the present assesssee M/s. R.K.Industries. Three of the partners of the assessee were also partners in M/s. Chimanlal Devchand & Co. The assessee firm was reconstituted by inducting new partners. One of the Partners brought in some capital. The three common partners retired and were paid their share of the goodwill. These three partners have also paid the capital gains tax.

. The Assessing Officer sought to assess the firm for capital gains. That order was reversed by the Commissioner (Appeals). The revenue aggrieved, preferred an appeal before the I.T.A.T. and that appeal has been dismissed relying on the judgment of the Supreme Court in Additional C.I.T. Vs.

Mohanbhai Pamabhai, 165 ITR. 166 (SC).

. The Revenue has preferred this appeal on the following question :

> "Whether on the facts and in the circumstances of the case and in law, the Hon'ble Tribunal is correct in holding that the amount brought in by the inducted partners of the assessee firm cannot be taxed under the head capital gains "

. The issue as framed really was not the subject matter before the authorities below. The learned counsel for the revenue had tried to rely on the judgment in Commissioner of Income Tax Vs. A.N. Naik Associates and another, 265 ITR 346. That was a case of interpretation of Section 45 and the expression "otherwise". This court held that after the amendment, transfer of assets to a retiring partner or partner would be subject to capital gains. In the instant case, the partnership continues to be the owner. Consequently the judgment cited would not apply.

. Considering the above, in our opinion, the issue as framed would not arise. Hence, appeal dismissed.

(J.P. DEVADHAR, J.) **(F.I.REBELLO, J.)**